ECORD
AND I
RIEFS.

No. 16-1161

IN THE
Supreme Court of the United States

BEVERLY R. GILL, *et al.*,
Appellants,

v.

WILLIAM WHITFORD, *et al.*,
Appellees.

On Appeal from the
United States District Court for the Western District of Wisconsin

BRIEF OF *AMICI CURIAE* LEAGUE OF CONSERVATION VOTERS *ET AL.* IN SUPPORT OF APPELLEES

CARY E. ADICKMAN
MADELINE H. GITOMER
HUNTER J. KENDRICK
HOGAN LOVELLS US LLP
555 Thirteenth St., NW
Washington, DC 20004
(202) 637-5600

IRA M. FEINBERG
Counsel of Record
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-3000
ira.feinberg@hoganlovells.com

SUSAN M. CRAWFORD
PINES BACH LLP
122 West Washington
Avenue, Suite 900
Madison, WI 53703

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 5

ARGUMENT 9

I. POLITICAL SCIENCE RESEARCH SHOWS THAT A REAPPORTIONMENT PLAN WITH A LARGER EFFICIENCY GAP WILL RESULT IN ADOPTION OF MORE PARTISAN AND EXTREME POLICIES 9

II. THE EXPERIENCE IN WISCONSIN SINCE 2011 DEMONSTRATES THAT THE LEGISLATURE HAS ADOPTED MORE PARTISAN AND EXTREME POLICIES THAT DISREGARD LONGSTANDING BIPARTISAN CONSENSUS ON MANY KEY ISSUES 15

A. Drastic Budget Cuts Have Undermined Wisconsin's Longstanding Commitment to Public Education 15

1. *Reducing Support for K-12 Public Schools* 15

2. *Cutting Funding for the University of Wisconsin System* 20

TABLE OF CONTENTS

Page(s)

B. The Dismantling of the Non-Partisan Government Accountability Board Has Sullied Wisconsin's Reputation as a Model of Good Government 23

C. Extreme Policies Enacted Since the Redistricting Plan Have Tarnished Wisconsin's Strong Bipartisan Tradition of Natural Resources Conservation and Environmental Protection 31

CONCLUSION 39

TABLE OF AUTHORITIES

Page(s)

STATUTES:

Act of June 30, 1906, Pub. L. No. 59-398, Chapter 3929, § 2, 34 Stat. 805 3
1989 Wis. Act 31 31
1993 Wis. Act 16 18
1993 Wis. Act 437 § 9145(1x)(b) 16, 19
1997 Wis. Act 171 37
2003 Wis. Act 33 16
2007 Wis. Act 1 26
2007 Wis. Act 227 32
2011 Wis. Act 21 33
2011 Wis. Act 32 § 2582 19
2013 Wis. Act 1 38
2013 Wis. Act 20 § 9148 21
2015 Wis. Act 188 29
Wis. Stat. § 19.81(1) 24
Wis. Stat. § 20 38
Wis. Stat. § 36.01(2) 20
Wis. Stat. § 121.91(2m)(g)(4) 19
Wis. Stat. § 227.10 *et seq.* 33
Wis. Stat. § 293 38
Wis. Stat. § 295 38

CONSTITUTIONAL PROVISIONS:

Wis. Const. art. X (1848) 15
Wis. Const. art. X 18

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:

"2007 Wis. Act 1: Roll Call Vote," Wis. Assemb. J., Spec. Sess. (Jan. 30, 2007) 26

"2007 Wis. Act 1: Roll Call Vote," Wis. S. J., 98th Reg. Sess. (Jan. 30, 2007) 26

Stephen Ansolabehere et al., *Candidate Positioning in U.S. House Elections*, 45 Am. J. Pol. Sci. 136 (2001) 13

Assemb. Bill 426, 2011-2012 Leg. (Wis. 2012) 37

Scott Bauer, *State's Nonpartisan Election Board Ends; Two Partisan Boards Will Replace the 8-Year-Old Experiment; Elections Oversight New Entity Advised to 'Follow the Law,'* Wis. State J. (June 27, 2016) 30

Molly Beck & Matthew DeFour, *After Earlier Cuts, Scott Walker Proposes Spending Boost for Schools*, Wis. State J. (Feb. 6, 2017) 17

Kevin Beckman, *Slashed Budgets Push University of Wisconsin Faculty to Minnesota*, Minn. Daily (Sept. 19, 2016) 22

Lee Bergquist, *New Poll Shows Majority Oppose Mining Bill*, Milwaukee J. Sentinel (Feb. 25, 2013) 38

Bureau of Labor Statistics, *CPI-All Urban Consumers (Current Series)* 19

TABLE OF AUTHORITIES—Continued

Page(s)

Siri Carpenter, *How Scott Walker Dismantled Wisconsin's Environmental Legacy*, Sci. Am. (June 17, 2015) 32, 34, 38

Devin Caughey et al., *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies* 11, 12, 13

James K. Conant, *Wisconsin Politics and Government* (2006) 15, 16, 23, 31, 32, 34

Dep't of Nat. Res., *About the DNR* 33

Katelyn Ferral, *As the Government Accountability Board Ends, What's the Future for Wisconsin Campaign Finance Regulation?*, Capital Times (June 20, 2016) 29

Anthony Fowler & Andrew B. Hall, *Long-Term Consequences of Election Results*, 47 Brit. J. Pol. Sci. 351 (2017) 13

Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 Am. Pol. Sci. Rev. 541 (1994) 11

Gov't Accountability Bd., *2008 GAB 1: Representation of Clients* 27

Christopher Hare et al., *Polarization in Congress Has Risen Sharply, Where Is It Going Next?*, Wash. Post (Feb. 13, 2014) 14

TABLE OF AUTHORITIES—Continued

Page(s)

Karen Herzog & Patrick Marley, *Scott Walker Budget Cut Sparks Sharp Debate on UW System*, Milwaukee J. Sentinel (Jan. 28, 2015) 22

Karen Herzog, *Wisconsin One of Few States Taking Up Higher Education Cuts*, Milwaukee J. Sentinel (May 28, 2015) 21

Steven Huefner et al., *From Registration to Recounts: Developments in the Election Ecosystem of Five Midwestern States* (2011) 27

Steven Huefner et al., *From Registration to Recounts: The Election Ecosystems of Five Midwestern States* (2007) 23, 24

Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. Chi. Legal F. 205 (1995) 9

Russ Kava & Layla Merrifield, *State Aid to School Districts*, Wis. Legislative Fiscal Bureau (Jan. 2007) 16

Russ Kava & Rick Olin, *Local Government Expenditure and Revenue Limits*, Wis. Legislative Fiscal Bureau (Jan. 2013) 18, 19

David S. Lee et al., *Do Voters Affect or Elect Policies? Evidence from the U.S. House*, 119 Q. J. Econ. 807 (2004) 13

TABLE OF AUTHORITIES—Continued

Page(s)

2 Legislative Fiscal Bureau, *Comparative Summary of Budget Recommendations* (Aug. 2011) 17, 18

Bill Leuders, *Iron Mine Is Halted, But Battle Scars Remain*, Wis. Watch (Mar. 17, 2015) 37, 38

Lower Wis. State Riverway Bd., *Welcome* 31

Patrick Marley & Stacy Forster, *Legislators Join Ethics Cause Late; Republicans Who Killed Bill Now Use Issue in Campaigns*, Milwaukee J. Sentinel (Sept. 24, 2006) 25

Patrick Marley & Jason Stein, *Assembly Approves Splitting GAB into Elections and Ethics Agencies*, Milwaukee J. Sentinel (Oct. 21, 2015) 29

Theodoric Meyer, *In Wisconsin, Dark Money Got a Mining Company What It Wanted*, Pro Publica (Oct. 14, 2014) 37

Richard G. Niemi & Simon Jackman, *Bias and Responsiveness in State Legislative Districting*, 16 Legis. Stud. Q. 183 (1991) 11

Mark Pitsch, *Board Comes Out Swinging; New Government Accountability Board is More Aggressive Than the Board It Replaces*, Wis. State J. (Apr. 14, 2008) 27

TABLE OF AUTHORITIES—Continued

Page(s)

Mark Pitsch, *Real Ethics Reform: This Time, They Might Be Serious: Supporters Say the Time is Right to Finally Get a Meaningful Bill Passed*, Wis. State J. (Nov. 26, 2006) 25

Press Release, Gov. Jim Doyle, Dec. 14, 2006 26

Press Release, State Rep. Karl Van Roy, Jan. 30, 2007 26

Press Release, State Rep. Scott Suder, Jan. 3, 2007 26

Reform Bandwagon is Filling Up Fast, The Sheboygan (Sept. 27, 2006) 25

Steve Rundio, *Scott Walker visits Tomah*, Tomah J. (Sept. 8, 2010) 16

Steven Salzberg, *Scott Walker Takes $250 Million From U. Wisconsin, Gives $250M To Billionaire Sports Team Owners*, Forbes (Aug. 14, 2015) 21

Nico Savidge, *UW-Madison Losing Ground to Competitors Amid Budget Cuts, Rebecca Blank Says*, Wis. State J. (Sept. 15, 2016) 22, 24

Luke Schaetzel, *Just How Much Has the UW System Lost Since 2011?*, Observatory (Nov. 9, 2016) 21

Ron Seely, *Safe, Clean Drinking Water Eludes Many Wisconsinites*, Minn. Post (Nov. 18, 2015) 36, 37

TABLE OF AUTHORITIES—Continued

Page(s)

Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 Am. Pol. Sci. R. 530 (2010) 13

Patricia Simms, *Wisconsin get D grade in 2015 State Integrity Investigation, Ctr. for Pub. Integrity* (Nov. 9, 2015) 28

State Ethics Panel Gets First Big Vote, Wis. State J. (Aug. 28, 2016) 30

Jason Stein, *Wisconsin Ethics Commissioner Resigns in Disgust*, Milwaukee J. Sentinel (Dec. 12, 2016) 30

Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering* (June 21, 2017) 11

Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015) 14

Sen. Lena Taylor, *GAB's Obituary*, Milwaukee Courier, July 2, 2016 30

Ross Terrell, *Study: Budget Cuts Is A Top Factor In Declining Faculty Morale At UW-Madison*, Wis. Pub. Radio (Apr. 7, 2017) 22

Presidential Comm'n on Election Admin., *The American Voting Experience: Report and Recommendations* (Jan. 2014) 27

The Pew Charitable Trs., *The Elections Performance Index 2012* (Apr. 2014) 28

TABLE OF AUTHORITIES—Continued

Page(s)

Tommy Thompson, *Government–University Collaboration at the Root of The Wisconsin Idea*, Capital Times (Jan. 4, 2017) 20, 22

Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 U.C. Irvine L. Rev. 575 (2013) 24, 27

U.S. Census Bureau, *Per Pupil Current Spending (PPCS) Amounts and One-Year Percentage Changes for PPCS of Public Elementary-Secondary School Systems by State: Fiscal Years 2007-2012* (May 22, 2014) 17

Univ. of Wis., *The Wisconsin Idea* 20

Steven Verburg, *Fines for Pollution Fell to 30-Year Low in 2015*, Wis. State J. (May 19, 2016) 35

Steven Verburg, *Gogebic Taconite Says Wisconsin Mine Isn't Feasible; Cites Wetlands, EPA* Wis. State J. (Feb. 28, 2015) 37, 38

Steven Verburg, *Scott Walker, Legislature Altering Wisconsin's Way of Protecting Natural Resources*, Wis. State J. (Oct. 4, 2015) 32, 33, 34, 35, 36

Steven Verburg, *Secretary Cathy Stepp Leaving DNR to Join Donald Trump's EPA* (Aug. 30, 2017) 36

TABLE OF AUTHORITIES—Continued

Page(s)

Sen. Kathleen Vinehout, *Putting Political Parties Back in Charge of Elections and Ethics?* (Oct. 14, 2015) 28

Scott Walker Takes $250 Million From U. Wisconsin, Gives $250M To Billionaire Sports Team Owners, Forbes (Aug. 14, 2015) 21

Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 Stan. L. Rev. 1263 (2016) 9

Jodi Wilgoren, *In Wisconsin, Scandal, Outrage and Deficit Churn Up a Storm of Political Change*, N.Y. Times (May 19, 2002) 24

Cassandra Willyard, *After Censoring Stories, Gov. Scott Walker Wants to Kill Off Self-Funded Outdoors Magazine*, Colum. Journalism Rev. (May 1, 2017) 35

Wis. Gov. Signs Budget Cutting Education $1.85B, CBS News (June 26, 2011) 19

Wis. Budget Project, *An Overview of Education Issues in the 2013–15 Budget* (2013) 19

Wisconsin Elections Performance Index, The Pew Charitable Trs. (Apr. 2014) 28

Wis. State Elections Bd., *Results of Fall General Election* (Nov. 7, 2006) 25, 28

Wis. State Leg., *Record of Committee Proceedings* (2015) 28

TABLE OF AUTHORITIES—Continued

Page(s)

Dave Zweifel, *Plain Talk: Next November, Remember Who Butchered Good Government In Wisconsin*, Capital Times (Nov. 18, 2015) 28, 29

Dave Zweifel, *We, The People? No. We, The Irrelevant*, Capital Times (Dec. 24, 2015) 29

IN THE

Supreme Court of the United States

No. 16-1161

BEVERLY R. GILL, *et al.*,

Appellants,

v.

WILLIAM WHITFORD, *et al.*,

Appellees.

On Appeal from the
United States District Court for the Western District of Wisconsin

BRIEF OF *AMICI CURIAE* LEAGUE OF CONSERVATION VOTERS *ET AL.* IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST[1]

The League of Conservation Voters, National Education Association, Wisconsin Education Association Council, League of Women Voters of Wisconsin, Dr. Anthony Evers and George Meyer respectfully sub-

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. The parties have filed letters with the Clerk granting blanket consent to the filing of *amicus curiae* briefs in this case.

mit this brief as *amici curiae* in support of Appellees. *Amici* are organizations and individuals who closely monitor Wisconsin elections and government and are greatly concerned by the adverse impact of the partisan gerrymandering engineered by the State Legislature in 2011. As the court below found, Act 43 deliberately apportioned districts for State Senate and Assembly elections in a way that both guarantees that Republicans control the Legislature in numbers that far exceed their actual support among Wisconsin voters and has entrenched that control for nearly a decade. *Amici* have seen the dramatic effect on political life in Wisconsin, as the gerrymandering has enabled the Legislature to pursue a narrow partisan agenda that has undermined values and policies long held by a bipartisan majority of Wisconsin voters.

The League of Conservation Voters ("LCV") is a non-profit environmental advocacy organization with more than two million members throughout the United States, including more than 58,000 members in Wisconsin, and has partner organizations in twenty-nine States including Wisconsin. LCV advocates for sound environmental law and policies, and works to elect pro-environment candidates who will champion clean energy, air and water issues irrespective of party affiliation.

The National Education Association ("NEA") is a nationwide organization representing more than 3 million elementary and secondary teachers, higher education faculty, education support professionals, school administrators, retired educators, and students preparing to become educators. Chartered by an Act of Congress in 1906 "to elevate the character and advance the interests of the profession of teach-

ing, and to promote the cause of education in the United States," Act of June 30, 1906, Pub. L. No. 59-398, ch. 3929, § 2, 34 Stat. 805, NEA's interest in this litigation stems from its concern that extreme partisan gerrymandering has eroded a longstanding bipartisan consensus on support for public education, which NEA regards as the cornerstone of our social, economic, and political structure and values.

The Wisconsin Education Association Council ("WEAC") is an unincorporated organization whose membership includes over 34,000 teachers and other employees employed by public school districts in Wisconsin. WEAC's purpose is to promote the interests of public education, the teaching profession and the welfare of members of the collective bargaining units that are affiliates of WEAC. The issues presented in this case are of special concern to WEAC members because the partisan gerrymandering has led to dramatic cutbacks in support for public education in Wisconsin.

The League of Women Voters of Wisconsin ("the League") is a non-partisan organization that advocates for citizens' rights to informed and active participation in government. The League has advocated for reforms to ensure that Wisconsin voting districts are drawn on a non-partisan basis since 1981. The League also strongly supports: legislative efforts to ensure that government officials are subject to the highest ethical standards; equal educational opportunities for children through an equitable state aid formula; and preservation of a healthy physical environment.

Dr. Anthony Evers is the Superintendent of Public Instruction of the State of Wisconsin, a statewide elective office charged with supervising public educa-

tion. He was elected to that non-partisan position in 2009 and has been re-elected twice, in 2013 and 2017. He previously served as Deputy Superintendent from 2001 to 2009. As Superintendent, Dr. Evers is the head of the Department of Public Instruction, the state agency responsible for advancing public education in Wisconsin. He is also an *ex officio* member of the state university's Board of Regents. As the non-partisan guardian of the state's public educational institutions, Dr. Evers is aware of the adverse impact of the State's declining commitment to K–12 and higher education on Wisconsin's longstanding tradition of excellence in education. Dr. Evers has recently announced his candidacy for Governor of Wisconsin in 2018, as a Democrat.

George Meyer is the Executive Director of the Wisconsin Wildlife Federation, a conservation group dedicated to the protection of Wisconsin's fish and wildlife habitat for the benefit of Wisconsin hunters and fishermen. Before taking that position in 2003, Mr. Meyer worked for thirty-two years at the Wisconsin Department of Natural Resources. He was appointed as Secretary (or head) of the Department of Natural Resources by the state Natural Resources Board in 1993, was re-appointed by Republican Governor Tommy Thompson in 1995, and served in that capacity until 2001. Mr. Meyer is greatly concerned that the actions of the gerrymandered Legislature in recent years have undermined longstanding state conservation policies and disregarded what had been a bipartisan consensus in favor of protecting Wisconsin's outdoor heritage.

SUMMARY OF ARGUMENT

The District Court found that the Republican-controlled Wisconsin Legislature, through the use of

extensive computer modeling, created a redistricting plan that intentionally imposed a severe impediment on the effectiveness of the votes of Democratic voters. J.S. App. 3a, 126a-177a. The District Court explained that its conclusion on the discriminatory effect of the reapportionment was "bolstered" by plaintiffs' evidence demonstrating a sizeable "efficiency gap." *Id.* at 159a.

The "efficiency gap" is a simple tool for measuring the extent of partisan bias in a reapportionment plan, and thus the discriminatory effect of a gerrymander. It is an easily calculated ratio that quantifies the comparative relationship of one party's "wasted votes"—votes cast in a losing race, or votes cast in a winning race in excess of the number necessary to win—to the other party's. The size of the efficiency gap after redistricting thus illustrates the degree to which the gerrymander has successfully diminished the effectiveness of the other party's votes.

This brief focuses on one of the most pernicious effects of a partisan gerrymander: that it results in the adoption of state policies that are more partisan and extreme than the broad middle of voters would support. Appellants' brief (at 50), relying on the dissenting opinion of Judge Griesbach in the District Court, argues that a Republican legislator in a swing district will adopt more moderate, centrist positions than a Republican in a safe district. But this easy reassurance is of no relevance in assessing the effect of a partisan gerrymander. The goal of a partisan gerrymander—and the goal of the Wisconsin Legislature here—was to modify the composition of as many districts as possible so as to favor Republicans and create a safe Republican majority, by packing Demo-

cratic voters into a smaller number of overwhelmingly Democratic districts. Legislators in these Republican districts do not have to consider their Democratic constituents, or even the more moderate voices in their own party. Political science research has shown that these legislators will toe the party line regardless of the ideological midpoint of their constituency, and that, with their party's majority secure, legislators will support more partisan policies that depart from any bipartisan consensus.

This brief first reviews recent political science research, which demonstrates that partisan gerrymanders with a high efficiency gap are strongly associated with adoption of state policies that are more partisan and extreme than the State's median voter supports. This research also shows that the conventional wisdom relied upon by Appellants—that legislators from swing districts will gravitate towards the center—is mistaken. On the contrary, even in districts where the margin of victory was very small, analysis shows that there is a vast difference in the voting records of the elected representatives, depending upon whether the Democrat or Republican came out on top.

This brief will go on to show that, in fact, the adoption of more partisan and extreme policies is exactly what has happened in Wisconsin: since the adoption of the State's redistricting plan in 2011, the longstanding bipartisan consensus on many state policies has been upended and replaced with partisan policies that are not supported by the Wisconsin public at large.

We explore in detail four examples, though there are many others that could be pursued if space permitted. First, in education, Wisconsin has long

prided itself on its strong support for K–12 public education, under both Republican and Democratic leadership. In the 1990s, Republican Governor Tommy Thompson pledged that the State would provide two-thirds of the funding for public schools. That strong commitment to public education has been the standard for Wisconsin ever since, leading to one of the best public school systems in the country. But since the reapportionment, state support for the public schools has been cut dramatically. State legislators have even restricted the ability of local governments to raise additional money to support their public schools, even when citizens of those localities attempt to raise their own taxes to pay for it.

Second, the effect of the gerrymandering on the University of Wisconsin system has also been dramatic. The University of Wisconsin system has long been one of the State's crown jewels, and central to the "Wisconsin idea," that the state university system exists to serve all state citizens and to benefit their lives far beyond the classroom. But since 2011, the Legislature has dramatically cut funding for the university system, even though up to 70% of state citizens opposed these budget cuts. The result has been devastating: hundreds of positions have been cut, faculty members have left for other universities, and even the Chancellor of the University's flagship campus in Madison has had to admit that the quality of that campus has "slipped."

Third, Wisconsin citizens have long been proud of their State's well-deserved reputation for good, clean state government, ever since the era of Republican Governor Robert LaFollette a hundred years ago. As recently as 2007, the bipartisan consensus in support

of clean government led to creation of the Government Accountability Board, a non-partisan panel of former state judges to oversee state elections and the ethics of public officials. The Government Accountability Board was popular and effective, and hailed as a "worthy model" for other States. But despite this—and despite overwhelming Republican support just a few years earlier—the gerrymandered Legislature dismantled the Board in 2016, replacing it with two much weaker commissions, composed of openly partisan members, to oversee public officials' ethics and elections.

Finally, Wisconsin residents have always treasured the State's natural resources and wildlife, and there has long been strong bipartisan support for environmental protection and conservation to benefit all forms of outdoor recreation. But this bipartisan consensus has been ripped asunder since the reapportionment. The State's Department of Natural Resources has been underfunded and subjected to political interference. The Legislature also passed a mining deregulation law for the benefit of one politically influential company, which weakened protections for wetlands and Lake Superior. The Legislature's actions have significantly relaxed rules to address pollution, reduced protections for Wisconsin's rivers and lakes, and undermined policies intended to protect the State's wildlife and natural resources, despite broad popular support for these conservation policies.

ARGUMENT

I. POLITICAL SCIENCE RESEARCH SHOWS THAT A REAPPORTIONMENT PLAN WITH A LARGER EFFICIENCY GAP WILL RESULT IN ADOPTION OF MORE PARTISAN AND EXTREME POLICIES.

"Computer technology has evolved dramatically to the point that . . . actors are able to carve ever more intricate districting patterns that seek to advance a particular political agenda. . . . [T]he new computer technology allows virtually anyone to redistrict consistent with general equipopulation principles and rerun past elections across altered district lines to determine optimal future arrangements." Those words were written twenty-two years ago. Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. Chi. Legal F. 205, 232-33 (1995). In the intervening years, redistricting technology has become much more advanced, and accessible to legislators and individuals alike. *See* Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 Stan. L. Rev. 1263, 1267 (2016) (noting that "even activists and ordinary citizens can enter the fray," using free redistricting software).

With the power to redraw districts with nearly scientific precision to entrench a party in the legislature comes the temptation to exercise it. In adopting Act 43, the Wisconsin Legislature "intended and accomplished an entrenchment of the Republican Party likely to endure for the entire decennial period." J.S. App. 107a. The drafters of the Wisconsin redistricting plan used a computer program with past election data and current demographic information to "assess the partisan make-up of the new

districts" they were drawing and create a "partisan score" to project the number of seats Republicans likely would win under various alternative maps. *Id.* at 17a-18a. The Legislature ultimately adopted a map that ensured a significant and durable partisan advantage for Republicans, which "would solidify Republican control." *Id.* at 128a. In an environment where a legislature has the intent and capacity, with such stunning precision,[2] to redraw districts to ensure that the party in power stays in power, it is increasingly important to be able to measure—and once measured, remedy—the discriminatory effect of partisan gerrymanders.

The "efficiency gap" is a simple and easily calculated tool for measuring the discriminatory effect of a gerrymander. For a given election, it is calculated by subtracting the "wasted" votes of one party from those of the other, and dividing by the total number of votes cast. *Id.* at 31a-33a. A "wasted" vote is one that did not help the chosen candidate win, and includes all votes for the losing candidate and all surplus votes for the winner above the minimum necessary to win. *Id.* It stands to reason that if one can increase an opposing party's wasted votes through redistricting, the party in power can significantly increase the likelihood it will win more seats.

Recent political science research has shown that when a single party has control over redistricting,

---

[2] The map drawers projected that the map would yield 59 Republican seats in the 99-seat Assembly; in the 2012 election, it actually yielded 60 Republican seats, J.S. App. 25a, 30a, even though Republican candidates won less than 50% of the popular vote statewide.

the efficiency gap is significantly increased in that party's favor. A study of state legislative and congressional elections since 1972 by Professor Nicholas Stephanopoulos of the University of Chicago Law School reveals that unified party control over redistricting had a significant effect on the efficiency gap, resulting in a pro-Democratic increase of 3 to 3.5 percentage points when Democrats controlled the process and pro-Republican increase of 4.5 points when Republicans controlled it. Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering* (June 21, 2017) (unpublished manuscript) (on file with the William & Mary Law Review).[3] *See also, e.g.*, Richard G. Niemi & Simon Jackman, *Bias and Responsiveness in State Legislative Districting*, 16 Legis. Stud. Q. 183, 195 (1991) (state legislative plans designed by Democrats had average pro-Democrat bias of 4.1%, while Republican-drafted maps had average pro-Republican bias of 4.5%); Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 Am. Pol. Sci. Rev. 541, 553 (1994)[4] (unified partisan control produced 3% bias in state legislative elections in favor of map-drawing party).

Recent research has evaluated the effect of the efficiency gap on state policy. Professors Caughey, Tausanovitch and Warshaw found that large efficiency gaps distort both legislative representation and policy results. *See* Devin Caughey et al., *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies* 10-11

---

[3] *Available at* goo.gl/pu8YkY.

[4] *Available at* goo.gl/fJK8zg.

(unpublished manuscript) (on file with the Election Law Journal)[5] ("*Partisan Gerrymandering*") (years in which efficiency gap was more pro-Republican than average "tended to have more conservative roll-call voting behavior"); *id.* at 10-11, 12 (Figure 4) (same correlation for pro-Democratic efficiency gaps, to less severe extent). Moreover, as the efficiency gap grew in a more Republican direction, the median ideal point of the state legislators—*i.e.*, the median point of legislators' substantive policy positions—grew significantly more conservative. *Id.* at 12-14.

Their research also shows that legislatures whose redistricting plans are characterized by large efficiency gaps enact more extreme policies. Caughey, Tausanovitch and Warshaw found that:

> [A] pro-Republican EG [Efficiency Gap] shifts the median state legislator markedly to the right, whereas a pro-Democratic EG shifts the median to the left. Analogously, state policies become more conservative when the EG favors Republicans and (with less certainty) more liberal when the EG favors Democrats. Though smaller than its effects on legislative medians, the EG's policy effects are nonetheless substantial. Indeed, a one standard deviation change in the efficiency gap has a larger effect on state policy than a change in the party of the governor. Overall, these results suggest that partisan gerrymandering has major consequences not only for who wins elections, but for the political process as a whole.

Id. at 3; *see also id.* at 10-13.

---

[5] *Available at* goo.gl/ftB6xP; *see also* goo.gl/iAJYdM.

Appellants argue (at 50) that a legislator in a swing district will align his or her policies with the median voter in order to win re-election. But the research shows that this conventional wisdom is mistaken. In close elections, electing a Republican legislator will result in more conservative roll-call voting, and electing a Democrat more liberal voting—legislators do not gravitate toward the center as Appellants argue. *See* Caughey et al., *Partisan Gerrymandering* 11; *accord* Anthony Fowler & Andrew B. Hall, *Long-Term Consequences of Election Results*, 47 Brit. J. Pol. Sci. 351 (2017)[6]; David S. Lee et al., *Do Voters Affect or Elect Policies? Evidence from the U.S. House*, 119 Q. J. Econ. 807 (2004)[7] (finding that winning an election by a smaller margin does not result in more moderate policies); Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 Am. Pol. Sci. R. 530 (2011).[8] In other words, legislators will toe the party line even where it would otherwise appear to be in their self-interest to conform to the median voter's ideal point (ideological midpoint). *See* Caughey et al., *Partisan Gerrymandering* 6-8 (showing party affiliation's effect on roll-call voting and state policy). Other studies show that legislators now trim much less toward the center, even in marginal districts, than they did in the mid-twentieth century. *See* Stephen Ansolabehere et al., *Candidate Positioning in U.S. House Elections*, 45 Am. J. Pol. Sci. 136 (2001)[9]; *see*

---

[6] *Available at* goo.gl/yCZuX6.

[7] *Available at* goo.gl/WC4thv.

[8] *Available at* goo.gl/XaYQKa.

[9] *Available at* goo.gl/NCjavs.

also Christopher Hare et al., *Polarization in Congress Has Risen Sharply. Where Is It Going Next?*, Wash. Post (Feb. 13, 2014).[10] Appellants offer no political science research to support their position, because there is none.

Given the technological advances that have made it ever easier to produce a partisan advantage, recent decades have seen a massive increase in the magnitude of efficiency gaps in redistricting plans. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 876 (2015); *see also* SA 227.

Thus, the research shows that in redistricting plans characterized by large efficiency gaps, the party in power will translate votes to seats in the legislature more efficiently, win more seats, and enact more polarized policies. Given the recent tendency for redistricting plans to result in higher efficiency gaps, the trend of legislators in swing districts declining to conform their voting to the median voter, and the resulting more extreme policies that disregard the voters of the other party, it is more urgent than ever for this Court to address the kind of blatant effort to disenfranchise the voters of the other party that the District Court found here.

---

[10] *Available at* goo.gl/uUW8f9.

II. THE EXPERIENCE IN WISCONSIN SINCE 2011 DEMONSTRATES THAT THE LEGISLATURE HAS ADOPTED MORE PARTISAN AND EXTREME POLICIES THAT DISREGARD LONGSTANDING BIPARTISAN CONSENSUS ON MANY KEY ISSUES.

The experience in Wisconsin since the 2011 reapportionment fully bears out the prediction of these academic researchers: on issue after issue, the gerrymandered legislature has adopted highly partisan policies that disregard a longstanding bipartisan consensus and are not supported by the broad majority of Wisconsin voters.

A. Drastic Budget Cuts Have Undermined Wisconsin's Longstanding Commitment to Public Education.

The policies enacted by the Wisconsin Legislature since 2011 have resulted in a dramatic shift in education policy and priorities. Legislators have abandoned long-held bipartisan values concerning both the Kindergarten through Twelfth Grade (K–12) public schools and the University of Wisconsin system.

1. Reducing Support for K–12 Public Schools

Wisconsin has long prided itself on its "extraordinary commitment" to K–12 public education. James K. Conant, *Wisconsin Politics and Government* 28 (2006). In 1848, voters ratified the State's first constitution, including an article explaining the responsibilities of state and local governments to educate their children. Wis. Const. art. X (1848). Wisconsin has made education a budget priority since the early 1900s, and has given "generous

support to school districts" in the decades since. Conant, *supra*, at 27, 29. Since the redistricting, however, the Legislature has passed a series of substantial budget cuts that have weakened the State's public education system. These budget cuts not only reduced overall funding for public schools, but abandoned a bipartisan policy to fund the public schools mainly through state, rather than local, contributions.

Historically, public education funding has been a bipartisan priority in Wisconsin. In the 1990s, Republican Governor Tommy Thompson pledged that the State would provide two-thirds of the funding for K–12 public schools. This pledge was enacted into law with bipartisan support. 1993 Wis. Act 437 § 9145(1x)(b). This pledge aimed to provide adequate per-pupil public education funding, while holding the line on local property taxes. From the pledge's implementation in 1996 until its repeal in 2003, the State's share of K–12 funding remained at 66%. Russ Kava & Layla Merrifield, *State Aid to School Districts*, Wis. Legislative Fiscal Bureau (Jan. 2007).[11]

Although the Legislature formally repealed the pledge in 2003, 2003 Wis. Act 33, the two-thirds funding pledge remained popular in Wisconsin. During his successful 2010 campaign for Governor, Scott Walker declared "it would be an aim" to restore state funding to two-thirds. Steve Rundio, *Scott Walker visits Tomah*, Tomah J. (Sept. 8, 2010).[12]

---

[11] *Available at* goo.gl/LI ly78.

[12] *Available at* goo.gl/QM4Qoz.

However, following the partisan gerrymander in 2011, the Republican-controlled Legislature, with Governor Walker's support, drastically cut funding for K–12 public schools. Wisconsin's 2011–2013 budget cut $792 million from aid to local K–12 schools. 2 Legislative Fiscal Bureau, *Comparative Summary of Budget Recommendations* 539 (Aug. 2011).[13] The State's share of K–12 funding dropped below 62%. *Id.* Per pupil spending in 2011–2012 dropped by 6.2% from 2010–2011, representing the largest per-pupil spending cut in the nation. The previous four years had seen increases of 2.6% to 4%. U.S. Census Bureau, *Per Pupil Current Spending (PPCS) Amounts and One-Year Percentage Changes for PPCS of Public Elementary-Secondary School Systems by State: Fiscal Years 2007-2012* (May 22, 2014).[14]

Although Governor Walker recently released a proposed budget increasing state K–12 education funding, *see* Molly Beck & Matthew DeFour, *After Earlier Cuts, Scott Walker Proposes Spending Boost for Schools*, Wis. State J. (Feb. 6, 2017),[15] the proposed increases are grossly insufficient to make up the ground lost with the 2011 cut.[16]

---

[13] *Available at* goo.gl/b2Xs9R.

[14] *Available at* goo.gl/mmb3T7.

[15] *Available at* goo.gl/Ua4E6v.

[16] Some of the legislative actions discussed in this brief took place during the Legislature's 2011 session, before legislators were elected under the 2011 reapportionment plan, first used in 2012. However, work on the plan began in January 2011, and the first maps were drafted by April. J.S. App. 12a-14a. Act 43 was passed by the Senate and Assembly in July 2011, and

Moreover, the Legislature has eroded local jurisdictions' autonomy over the amount of revenue they can raise for K–12 education. The state government's obligation to make substantial financial contributions to local school districts is enshrined in the state's constitution. *See* Wis. Const. art. X, § 5. But Wisconsin's constitution also requires local governments to tax residents specifically for "the support of common schools." *Id.* § 4. Cities and towns that fail to levy such taxes cannot receive state funding for K–12 education. *Id.* § 5.

Since 1993, the State has limited the amount of additional money local governments can collect from local property taxes, 1993 Wis. Act 16, but has permitted local governments to override these revenue limits by referenda. Russ Kava & Rick Olin, *Local Government Expenditure and Revenue Limits*, Wis. Legislative Fiscal Bureau 7 (Jan. 2013).[17] Under this system, local governments receive financial backing

---

signed by the Governor in August. At all times during the 2011 session, Republican legislators knew they had complete control of the reapportionment process and the ability (and will) to draw districts that would insulate Republican legislators from any serious challenge based on the policies they were implementing. As the District Court found, "from the outset of the redistricting process, the drafters sought to understand the partisan effects of the maps they were drawing," and "were concerned with, and convinced of, the *durability* of their plan." *Id.* at 138a, 139a. Indeed, in meetings with the Republican caucus, a staff member for the Majority Leader told them that the "maps we pass will determine who's here 10 years from now." *Id.* at 28a. This gave Republican legislators the freedom to enact highly partisan policies without concern for the electoral consequences or the popularity of their actions among the broader electorate.

[17] *Available at* goo.gl/QH7kzN.

from the state, but retain the power—and the responsibility—to tax their residents to fund schools.

Since the 2011 redistricting, however, the Legislature has restricted the ability of local governments to fund the public schools themselves, which—in combination with the cuts in state funding—has severely restricted funding for public education in Wisconsin. Whereas every previous budget had increased the per-pupil revenue limit by $190 to $274, the 2011–2013 state budget reduced the amount that school districts could collect by an average of $554 per pupil. *Id.* at 2-3; *see also* 2011 Wis. Act 32 § 2582 (codified at Wis. Stat. § 121.91(2m)(g)(4)) (reducing revenue cap by 5.5% per student). This restriction amounted to another $800 million cut, statewide, in overall funding for K–12 education. *See Wis. Gov. Signs Budget Cutting Education $1.85B*, CBS News (June 26, 2011).[18] While recent state budgets have increased the per-pupil revenue cap, the increases have not kept pace with inflation. *See* Wis. Budget Project, *An Overview of Education Issues in the 2013–15 Budget* (2013)[19] (noting that revenue cap increased by 0.8% in 2014 and 2015); Bureau of Labor Statistics, *CPI-All Urban Consumers (Current Series)*[20] (calculating inflation rate as 1.9% for July 2014 and 1.8% for July 2015).

The recent history of K–12 education funding in Wisconsin illustrates how partisan gerrymandering affects policy. Secure in their electoral majority,

---

[18] *Available at* goo.gl/ZpH1Y4.

[19] *Available at* goo.gl/WbcDLE.

[20] *Available at* goo.gl/W3dJKL (last visited Sept. 5, 2017).

legislators have abandoned decades-old policies in support of state funding for public schools, by slashing state funding and prohibiting Wisconsin citizens from offsetting the cuts through local referenda to increase their own taxes to fund schools.

2. Cutting Funding for the University of Wisconsin System

The effects of partisan gerrymandering on the University of Wisconsin System (the "UW System") are similarly troubling. Despite a robust history of bipartisan support for the UW System, the redistricting legislators have cut funding for the System by over $360 million.

These cuts undermine the non-partisan "Wisconsin Idea," a concept unique to Wisconsin, which views the University as a means to improve the quality of life for all the State's citizens. Univ. of Wis., *The Wisconsin Idea*.[21] The Wisconsin Idea is considered the guiding principle of the UW System. Tommy Thompson, *Government–University Collaboration at the Root of The Wisconsin Idea*, Capital Times (Jan. 4, 2017).[22] The Wisconsin Idea derives from former UW-Madison President Charles Van Hise's 1905 declaration that "I shall never be content until the beneficent influence of the [U]niversity reaches every home in the state." *Id.* This concept is enshrined in state statute; by law, UW's mission is "to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society." Wis. Stat. § 36.01(2).

---

[21] *Available at* goo.gl/jo8jdf (last visited Sept. 5, 2017).

[22] *Available at* goo.gl/PwDVLb.

After the 2011 gerrymandering, however, the Wisconsin Idea, and the UW's standing as one of the finest state university systems in the nation, are in jeopardy. In 2011, the Legislature imposed more than $100 million in budget cuts on the UW System. Luke Schaetzel, *Just How Much Has the UW System Lost Since 2011?*, Observatory (Nov. 9, 2016).[23]

Then, in 2015, the State cut the UW System's budget by an additional $250 million, *id.*, while largely preventing the university from raising tuition to cover costs, *see* 2013 Wis. Act 20 § 9148.[24] These cuts were deeply unpopular with Wisconsin voters. A majority of Wisconsin citizens—between 64% and 70%—disapproved of Governor Walker's original proposal to cut $300 million from the System's budget. *See* Karen Herzog, *Wisconsin One of Few States Taking Up Higher Education Cuts*, Milwaukee J. Sentinel (May 28, 2015).[25] The cuts adopted by the Legislature were also out of step with the rest of the country: Wisconsin was one of only six States to approve (or even consider) cuts in higher education funding that year. *Id.* From fiscal year 2012 to 2017, the UW System's budget has been cut by a total of $362 million. Schaetzel, *supra*.

---

[23] *Available at* goo.gl/VHSP21.

[24] The same year, the Legislature approved a $250 million expenditure to build a new arena for Wisconsin's professional basketball team, the Milwaukee Bucks. Steven Salzberg, *Scott Walker Takes $250 Million From U. Wisconsin, Gives $250M To Billionaire Sports Team Owners*, Forbes (Aug. 14, 2015), goo.gl/zndB3J.

[25] *Available at* goo.gl/s8WaUE.

The UW System has suffered greatly from these cuts. Before the $250 million cut took effect, the UW System's President announced moratoria on non-essential hiring, out-of-state travel, promotions, and non-statutory raises. *See* Karen Herzog & Patrick Marley, *Scott Walker Budget Cut Sparks Sharp Debate on UW System*, Milwaukee J. Sentinel (Jan. 28, 2015).[26] UW-Madison was forced to eliminate 420 positions and fire 50 employees in 2016. Nico Savidge, *UW-Madison Losing Ground to Competitors Amid Budget Cuts, Rebecca Blank Says*, Wis. State J. (Sept. 15, 2016).[27] UW-Madison Chancellor Rebecca Blank noted that the UW's flagship campus had "slipped" because it could not serve its faculty or students as well as competitors. *Id.* For example, several departments at UW-Madison have more than 500 students per adviser, almost twice the recommended number. *Id.* Over 90% of faculty at UW-Madison reported that the budget cuts had a negative impact on their morale. Ross Terrell, *Study: Budget Cuts Is A Top Factor In Declining Faculty Morale At UW-Madison*, Wis. Pub. Radio (Apr. 7, 2017).[28] Faculty began leaving the UW System for other universities because budget cuts made it feel "perilous" to remain in Wisconsin. *See* Kevin Beckman, *Slashed Budgets Push University of Wisconsin Faculty to Minnesota*, Minn. Daily (Sept. 19, 2016).[29]

---

[26] *Available at* goo.gl/jk1aSL.

[27] *Available at* goo.gl/tRJSkr.

[28] *Available at* goo.gl/ewFxSM.

[29] *Available at* goo.gl/2To2w5.

Thus, far from supporting the Wisconsin Idea, legislators have ravaged the UW System's budget and made it far more difficult for the System to live up to its mission.

B. The Dismantling of the Non-Partisan Government Accountability Board Has Sullied Wisconsin's Reputation as a Model of Good Government.

Wisconsin citizens are proud of their "good government" reputation. Since the early 1900s, when Republican Governor Robert LaFollette "ushered in an era of reform," Wisconsinites have come to expect "openness in government and honesty from their elected officials." Steven F. Huefner et al., *From Registration to Recounts: The Election Ecosystems of Five Midwestern States* 111 (2007)[30]; *accord* Conant, *supra*, at 4. One historian suggests this commitment to good government stems, in part, from the State's constitution, which was based, in part, on "the presumption that government has an important, positive role to play in society," and that "strong popular control over elected officials was to be maintained." Conant, *supra*, at 17. State legislators have reinforced this notion; since 1975, state law declares it "to be the policy of th[e] state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1).

The Government Accountability Board ("GAB") was one of the most significant recent initiatives to

---

[30] *Available at* goo.gl/MvLGxz.

ensure the integrity of state elections and public officials. The GAB was a non-partisan, independent enforcement body established in 2007 with strong bipartisan support to oversee state elections and enforce ethical standards for state officials. The GAB replaced two prior oversight bodies, the State Elections Board and State Ethics Board, which were criticized because their members were partisan appointees, resulting in weak oversight. To take the politics out of enforcement, members of the GAB had to be former judges. A candidate committee composed of court of appeals judges proposed potential members, and the governor was required to nominate GAB members from this list. Members were prohibited from engaging in political activities, and were ineligible if they had engaged in politics in the past. *See* Daniel P. Tokaji, *America's Top Model: The Wisconsin Government Accountability Board*, 3 U.C. Irvine L. Rev. 575, 577-79 (2013).

The creation of the GAB arose out of a series of political scandals in the early 2000s. *See* Jodi Wilgoren, *In Wisconsin, Scandal, Outrage and Deficit Churn Up a Storm of Political Change*, N.Y. Times (May 19, 2002).[31] Legislative leaders of both parties faced corruption investigations, leading to resignations and extensive negative publicity. Wisconsin residents were "dissatisf[ied] with how the state's campaign finance and lobbying rules were being enforced," and "believed that the state elections and ethics boards had been too lax in their enforcement." Huefner, *supra*, at 115.

---

[31] *Available at* goo.gl/4zndRH.

In 2005, a group of state legislators responded by introducing bipartisan ethics reform legislation, including creation of the GAB. At the time, however, control of state government was divided—the Governor was a Democrat, while Republicans controlled the Legislature—and the Republican leadership would not allow the bill to go forward. *See Reform Bandwagon is Filling Up Fast*, The Sheboygan, Sept. 27, 2006, at 5A. But once the 2006 election season began, lawmakers received a clear message from Wisconsin voters. Lawmakers in competitive districts, who had previously opposed the legislation, campaigned as "ethics reformers." Patrick Marley & Stacy Forster, *Legislators Join Ethics Cause Late; Republicans Who Killed Bill Now Use Issue in Campaigns*, Milwaukee J. Sentinel, Sept. 24, 2006, at A1. Democratic challengers "hammered incumbent Assembly Republicans" for standing in the way of ethics reform. News reports noted that "even Republicans who opposed [ethics reform] this spring have vowed to work toward a compromise." Mark Pitsch, *Real Ethics Reform: This Time, They Might Be Serious: Supporters Say the Time is Right to Finally Get a Meaningful Bill Passed*, Wis. State J., Nov. 26, 2006, at A1.

The result was that Democrats picked up eight seats in the Assembly and won control of the State Senate. Wis. State Elections Bd., *Results of Fall General Election* (Nov. 7, 2006).[32] And responding to the voters' message, the Assembly Speaker, Republican Mike Huebsch, who had previously blocked the legislation, pledged in a bipartisan

---

[32] *Available at* goo.gl/toXJHC.

announcement to pass "major, bipartisan ethics reform early in 2007." Press Release, Gov. Jim Doyle, Dec. 14, 2006.

Thus, ethics reform legislation, including creation of the GAB, was passed in early 2007, with unanimous Republican support. 2007 Wis. Act 1; *see* "2007 Wis. Act 1: Roll Call Vote," Wis. Assemb. J., Spec. Sess. (Jan. 30, 2007);[33] "2007 Wis. Act 1: Roll Call Vote," Wis. S. J., 98th Reg. Sess. (Jan. 30, 2007).[34] Voices on both sides of the aisle praised the legislation as a victory for good government. As one Republican state representative explained: "This bi-partisan ethics reform package will help restore the public's trust in their elected officials and Wisconsin's reputation for clean, ethical government." Press Release, State Rep. Scott Suder, Jan. 3, 2007. Another Republican lawmaker called the bill "the most sweeping ethics reform bill in Wisconsin history," noting that "the citizens of this state deserve a clean and honest government." Press Release, State Rep. Karl Van Roy, Jan. 30, 2007.

The GAB quickly established a reputation for independence and efficacy. In one of its first actions, the GAB overturned an Ethics Board policy that had provided special treatment to state lawmakers.[35]

---

[33] *Available at* goo.gl/jyKxZj.

[34] *Available at* goo.gl/4bLm6W.

[35] The Ethics Board had allowed state lawmakers who were attorneys to communicate with state agencies on behalf of special purpose districts that the lawmaker represented in private practice. Opponents argued that allowing legislators, acting in their private capacity, to negotiate with state employees whose budgets they controlled in their lawmaker capacity created the appearance of impropriety and raised concerns

Gov't Accountability Bd., *2008 GAB 1: Representation of Clients*.[36] This action was praised as showing "more steel and backbone" than the prior ethics enforcement agency. Mark Pitsch, *Board Comes Out Swinging; New Government Accountability Board is More Aggressive Than the Board It Replaces*, Wis. State J., Apr. 14, 2008, at A1.

The GAB was widely praised as a "worthy model" for other States. *See* Tokaji, *supra*, at 607. One elections expert wrote in 2011 that the GAB "achieves something that up until now has been a rarity in the United States: election administration that is independent of partisan politics." Steven Huefner et al., *From Registration to Recounts: Developments in the Election Ecosystem of Five Midwestern States* (2011) at 43.[37] In 2014, the bipartisan Presidential Commission on Election Administration, co-chaired by the former general counsels of the national Democratic and Republican Parties, cited the GAB as a "model," particularly for its work in improving accessibility to polling places for the disabled. *See* Presidential Comm'n on Election Admin., *The American Voting Experience: Report and Recommendations* 52 (Jan. 2014).[38] Researchers found in 2014 that Wisconsin had "dramatically improved its [election] data reporting between 2008 and 2012," and had the second highest voter partici-

---

about potential special treatment. The GAB voted to bar the practice.

[36] *Available at* goo.gl/BYTAjP (last visited Sept. 5, 2017).

[37] *Available at* goo.gl/pZFXkL.

[38] *Available at* goo.gl/DKXQdB.

pation rate in the nation. The Pew Charitable Trs., *The Elections Performance Index 2012* (Apr. 2014);[39] The Pew Charitable Trs., *Wisconsin Elections Performance Index* (Apr. 2014).[40]

Despite overwhelming Republican support just a few years earlier, however, starting in 2011, the Republican-controlled Legislature "waged war" on the GAB. Patricia Simms, *Wisconsin get D grade in 2015 State Integrity Investigation, Ctr. for Pub. Integrity* (Nov. 9, 2015).[41] What changed? By virtue of their election victory in 2010 and their complete control of the Legislature and Governor's office, Republican legislators knew they would be insulated from political consequences by their ability to control the redistricting plan. *See* J.S. App. 18a.

In 2015, the Legislature took the ultimate step of seeking to disband the GAB, a move widely believed to be "partisan 'payback' for investigations in which the GAB was involved." *See* Sen. Kathleen Vinehout, *Putting Political Parties Back in Charge of Elections and Ethics?* (Oct. 14, 2015).[42] One of the six retired judges to serve on the GAB called the action "a great step backwards." Dave Zweifel, *Plain Talk: Next November, Remember Who Butchered Good Government In Wisconsin*, Capital Times (Nov. 18, 2015).[43] The chair of the GAB, another retired judge,

---

[39] *Available at* goo.gl/xHchB7.

[40] *Available at* goo.gl/SVW2fb.

[41] *Available at* goo.gl/oaw5Xr.

[42] *Available at* goo.gl/z54LuF.

[43] *Available at* goo.gl/v861tC.

testified against dismantling the GAB at an Assembly hearing. Wis. State Leg., *Record of Committee Proceedings* (2015).[44] The Capital Times characterized the behavior of legislators as equivalent to "drunken sailors on shore leave" in their reckless exercise of raw power. "Only problem is, it's our government and our historic safeguards that are being smashed." Zweifel, *Next November, Remember, supra.* One citizen, a retired Milwaukee public school teacher, sent open records requests to each Republican legislator asking for copies of communications from constituents regarding the proposed legislation. Though not all such requests were fulfilled, the responses showed more than 2,500 communications in support of the GAB and only 189 against—i.e., more than 90% in favor of preserving the GAB. *See* Dave Zweifel, *Plain Talk: We, The People? No. We, The Irrelevant*, Capital Times (Dec. 24, 2015).[45]

Nevertheless, in early 2016 legislation to dismantle the GAB was enacted, on a "nearly party-line" vote. 2015 Wis. Act 188; *see* Patrick Marley & Jason Stein, *Assembly Approves Splitting GAB into Elections and Ethics Agencies*, Milwaukee J. Sentinel (Oct. 21, 2015).[46] The GAB ceased to exist on June 30, 2016, and was replaced by a "weak and politically connected commission," that allows "lawmakers [to] have a bigger role in the agency charged with regulating them, with authority over the majority of the commissions' appointees and its funding for

---

[44] *Available at* goo.gl/EGPqYT.

[45] *Available at* goo.gl/QNJwXX.

[46] *Available at* goo.gl/Nz6BDP.

investigations." Katelyn Ferral, *As the Government Accountability Board Ends, What's the Future for Wisconsin Campaign Finance Regulation?*, Capital Times (June 20, 2016)[47]; *State Ethics Panel Gets First Big Vote*, Wis. State J. (Aug. 28, 2016).[48]

Wisconsin legislators took this action despite the fact that "62% of those polled . . . said the board should remain an independent and impartial board of judges." Sen. Lena Taylor, *GAB's Obituary*, Milwaukee Courier, July 2, 2016. The former Executive Director of the GAB explained why the GAB was dismantled: "The people in power did not like being held to account." Scott Bauer, *State's Nonpartisan Election Board Ends; Two Partisan Boards Will Replace the 8-Year-Old Experiment; Elections Oversight New Entity Advised to 'Follow the Law,'* Wis. State J., June 27, 2016, at A3. And just months after the GAB was replaced (in part) by the Wisconsin Ethics Commission, one of the judges newly appointed to that Commission "resigned in disgust," stating that the agency was "ill-suited to its mission of ensuring clean government" and that the system "almost guarantees" that investigations of financial and ethical improprieties will not occur. Jason Stein, *Wisconsin Ethics Commissioner Resigns in Disgust*, Milwaukee J. Sentinel (Dec. 12, 2016).[49]

---

[47] *Available at* goo.gl/rNIOzP.

[48] *Available at* goo.gl/E4VpJX.

[49] *Available at* goo.gl/v0cZrp.

C. Extreme Policies Enacted Since the Redistricting Plan Have Tarnished Wisconsin's Strong Bipartisan Tradition of Natural Resources Conservation and Environmental Protection.

Historically, Wisconsin has been practically synonymous with environmental conservation. John Muir, the renowned naturalist, spent his formative years in Wisconsin and studied at UW-Madison. The father of American wildlife ecology, Aldo Leopold, settled in Wisconsin in 1924 and published the first textbook on wildlife management in 1933. Gaylord Nelson—the former Wisconsin governor and U.S. senator—founded Earth Day in 1970.

For decades, there has been a bipartisan commitment in Wisconsin to environmental protection and conservation of its abundant natural resources. During the 1970s, Wisconsin politicians and "the majority of the state's citizens supported the national government's efforts to reduce air and water pollution." Conant, *supra*, at 293. In the 1980s, "the state actively cooperated with the national government in efforts designed to reduce the risks that hazardous wastes posed for human health." *Id.* Republicans, including former Governor Thompson, worked closely with Democrats to enact historic legislation, like 1989 Wisconsin Act 31, which created the Lower Wisconsin State Riverway to help protect the natural beauty and ecological health of the 95,893 acres within the Riverway's boundaries. *See* Lower Wis. State Riverway Bd., *Welcome*.[50] As recently as 2008, with control of the Legislature split between the

[50] *Available at* goo.gl/PSYfGz (last visited Sept. 5, 2017).

parties, legislators almost unanimously passed, after lengthy negotiations and compromise, legislation implementing the historic Great Lakes Compact, a compact between eight States and two Canadian provinces to protect and manage the waters of the Great Lakes basin. *See* 2007 Wis. Act 227.

Wisconsinites still "expect state (and local) government to manage the state's natural resources carefully and to protect the environment vigilantly." Conant, *supra*, at 4, 17. Over the years, Wisconsin has earned its reputation as a sportsman's paradise because of the State's bipartisan efforts to preserve its natural beauty and conserve its wildlife and resources.

Yet this bipartisan tradition is now endangered, largely due to the extreme policies adopted by the Legislature since the 2011 redistricting plan rewired Wisconsin's politics. Wisconsin legislators have undermined the Wisconsin Department of Natural Resources ("DNR"), loosened rules designed to curb pollution, made it easier to endanger wetlands, and adopted policies that threaten the State's wildlife. *See* Steven Verburg, *Scott Walker, Legislature Altering Wisconsin's Way of Protecting Natural Resources*, Wis. State J. (Oct. 4, 2015)[51] ("*Protecting Natural Resources*"). The Legislature has done so much to undercut Wisconsin's protections for natural resources that one retired Republican state senator exclaimed: "'I think what's going on is appalling . . . . I'm a pretty pro-business Republican. But a clean environment is essential to business. This is just wholly unacceptable.'" Siri Carpenter, *How Scott*

---

[51] *Available at* goo.gl/NxWmHd.

Walker Dismantled Wisconsin's Environmental Legacy, Sci. Am. (June 17, 2015)[52] (quoting former Senator Dale Schultz). Though Wisconsin faces many conservation and environmental dilemmas because of the post-redistricting policies adopted by the Legislature, three are particularly worrisome: the politicization and weakening of the DNR, the interference with its efforts to protect clean drinking water, and the adoption of legislation that has weakened laws regulating mining.

Perhaps the most obvious change has been the increasing politicization of the DNR, the state agency responsible for protecting and managing Wisconsin's "fish, wildlife, forests, parks, air and water resources." Dep't of Nat. Res., *About the DNR*.[53] While campaigning in 2010, Governor Scott Walker called the DNR "out of control" and an impediment to job growth. *See* Verburg, *Protecting Natural Resources*, *supra*. Then, in 2011, the Legislature passed a law, Act 21, that gave the governor and legislators "much greater control of administrative rules that are written by DNR professionals and scientists." *Id.* Act 21 limited the DNR's ability to take rule-making, enforcement, or administrative actions beyond those "explicitly required or explicitly permitted by statute." 2011 Wis. Act 21 (codified as amended at Wis. Stat. § 227.10 *et seq.*). Act 21 also authorized the governor to issue executive orders to ensure that any new rules complied with existing statutes. *Id.*

---

[52] *Available at* goo.gl/XmrdWx.

[53] *Available at* goo.gl/wNsdNt (last visited Sept. 5, 2017).

Under this heightened political control, the DNR's environmental protection efforts have become lax. In 2013, the DNR restructured its advisory committee, cutting university scientists and adding more representatives from politically influential groups. *See* Carpenter, *supra*. Whereas the DNR was once "much more forceful in disagreeing with the legislature and making recommendations to improve the legislation," it now defers to legislators. *Id.* (quoting Adrian Wydeven, the former head of the DNR wolf management program under Governor Thompson). DNR scientists are restricted from speaking directly with lawmakers, and DNR employees complain that terms like "climate change" have become red flags in grant proposals. *Id.*

The Legislature has also slashed financial support for the DNR. Since the 1920s, the State's "commitment to . . . natural resource management has also been reflected in the [state] budget." Conant, *supra*, at 27. But in recent years, the Legislature has dramatically reduced the DNR's budget. Governor Walker's 2015–2017 budget proposal called for the removal of one-third "of all research scientist positions and more than half of all environmental educator positions from the DNR." Carpenter, *supra*. The budget approved by the Legislature removed 92 DNR employee positions, including 18 senior scientists who had previously "guide[d] the work of agency program managers." Verburg, *Protecting Natural Resources*, *supra*. Legislators also "complained about 'controversial' DNR research on wildlife, mining and climate change." *Id.* The most recent former Secretary of the DNR, Cathy Stepp—who was a vocal DNR critic when she served as Republican state senator, and stepped down as Secretary in August

2017—admitted that the DNR's staffing cuts were politically motivated:

> We've seen a pretty sound response from the Legislature during this last budget process on some things that they saw that happened historically in that particular area of the department that they were unhappy about, and they wanted to send a message to us, (which) is, you know, 'Get your researchers in better line with what their constituents are telling them, the legislators,' and we're going to do that.

Id. (quoting Secretary Stepp) (alteration in original).

This legislative interference has greatly diminished the DNR's effectiveness. The DNR is now less able to perform essential functions, including environmental enforcement. In 2015, the year of the major budget cuts, the fines DNR collected from polluters "plummeted to the lowest level in 30 years." Cassandra Willyard, *After Censoring Stories, Gov. Scott Walker Wants to Kill Off Self-funded Outdoors Magazine*, Colum. Journalism Rev. (May 1, 2017).[54] The fines imposed on polluters in 2015 decreased a staggering 88% from the year before. Steven Verburg, *Fines for Pollution Fell to 30-Year Low in 2015*, Wis. State J. (May 19, 2016).[55] Though Governor Walker has chalked this up to Wisconsin suddenly having fewer polluters, others—including George Meyer, a former DNR Secretary appointed by Governor Thompson (and an *amicus* on this brief)—have questioned whether an under-staffed DNR is con-

---

[54] *Available at* goo.gl/PduRbx.

[55] *Available at* goo.gl/FuCwUc.

ducting adequate inspections. *Id.* As Mr. Meyer put it, "If you don't look, you won't find." *Id.* Similarly, the Wisconsin State Journal recently reported that under Secretary Stepp, the U.S. Environmental Protection Agency ("EPA") called the DNR's effort to control fine-particle air pollution "a failure," and that the State's non-partisan Legislative Audit Bureau found that the DNR "failed to enforce its own standards for industrial and municipal water pollution 94 percent of the time." Steven Verburg, *Secretary Cathy Stepp Leaving DNR to Join Donald Trump's EPA* (Aug. 30, 2017).[56]

The Legislature has also undermined the DNR's efforts to provide Wisconsinites with clean drinking water. The EPA recently warned the DNR that Wisconsin's water quality protections are "inadequate or out of date." Verburg, *Protecting Natural Resources*, *supra*. An investigation by the Wisconsin Center for Investigative Journalism found that "[h]undreds of thousands" of Wisconsinites are "at risk of consuming drinking water tainted with substances including lead, nitrate, disease-causing bacteria and viruses, naturally occurring metals and other contaminants." Ron Seely, *Safe, Clean Drinking Water Eludes Many Wisconsinites*, Minn. Post (Nov. 18, 2015).[57]

In 2009, researchers found viruses in municipal water supplies, so state regulators began requiring disinfection. *Id.* But two years later, the Legislature rescinded that rule, with one Republican state representative calling it "'an unnecessary and financial

---

[56] *Available at* goo.gl/jSA9C5.

[57] *Available at* goo.gl/azhQDw.

bureaucratic burden.'" *Id.* (quoting Rep. Erik Severson). Researchers later linked the viruses in fourteen municipal water systems to "acute gastrointestinal illness." *Id.* But the fallout could have been much worse—according to the DNR, as of 2015, more than 73,000 Wisconsinites relied on water from public systems that did not disinfect. *Id.*

The redistricting process also paved the way for changes in mining laws and protections for Wisconsin's wetlands and waterways. In 1998, Governor Thompson signed a bipartisan mining moratorium law that required companies to prove that a sulfide ore mine could operate without polluting groundwater or surface waters. 1997 Wis. Act. 171. Yet in 2011, Republican policymakers began pushing for construction of an iron mine in an economically depressed area of northwestern Wisconsin, even though it was precluded under state law. Steven Verburg, *Gogebic Taconite Says Wisconsin Mine Isn't Feasible; Cites Wetlands, EPA*, Wis. State J. (Feb. 28, 2015) ("*Gogebic Taconite*")[58]; *see also* Bill Leuders, *Iron Mine Is Halted, But Battle Scars Remain*, Wis. Watch (Mar. 17, 2015).[59] The initial effort to enact legislation to authorize the mine failed. *See* Assemb. Bill 426, 2011-2012 Leg. (Wis. 2012).[60] But despite warnings from scientists, the mine's supporters kept pursuing legislation. *See Gogebic Taconite*. And the company pursuing the mine, Gogebic Taconite, contributed $700,000 to the Wisconsin Club for Growth, a conservative group supporting Republican

---

[58] *Available at* goo.gl/MGPKAr.

[59] *Available at* goo.gl/Gz13Ms.

[60] *Available at* goo.gl/T6ZLjB.

candidates, to improve its prospects. *See* Leuders, *supra*; *see also* Theodoric Meyer, *In Wisconsin, Dark Money Got a Mining Company What It Wanted*, Pro Publica (Oct. 14, 2014).[61]

The Legislature ultimately passed a mining deregulation law, which Gogebic Taconite helped to write, in 2013. *See Gogebic Taconite.* The law, 2013 Wisconsin Act 1, was enacted even though polling suggested that over 60% of Wisconsin voters opposed it. *See* Lee Bergquist, *New Poll Shows Majority Oppose Mining Bill*, Milwaukee J. Sentinel (Feb. 25, 2013).[62] Act 1 modified Wisconsin's mining regulations so that they only applied to the mining of nonferrous metals (excluding the proposed iron mine); and prohibited DNR from requiring any wetlands mitigation measures beyond those required under federal law. 2013 Wis. Act 1 (codified as amended in scattered sections of Wis. Stat., including §§ 20, 293, 295). Act 1 also allowed mining companies to dump mining waste in wetlands, streams, and lakes; doubled the area around mines where companies could permissibly pollute; "and strip[ped] citizens of the right to sue mining companies for illegal environmental damage." Carpenter, *supra.* The Legislature passed Act 1 despite the threat it posed to lakes, streams, wetlands and groundwater only 30 miles from Lake Superior. *See Gogebic Taconite.*

In the end, Gogebic Taconite gave up on its Wisconsin project, citing federal wetlands regulations. *See* Leuders, *supra.* Thus, the Legislature gutted Wisconsin's mining regulations, and ended up with

---

[61] *Available at* goo.gl/jN6y9j.

[62] *Available at* goo.gl/1R47aa.

nothing to show for it. The Legislature's mining deregulation is yet another disheartening example of an emboldened political majority—entrenched in power and protected from electoral consequences because of partisan gerrymandering—taking action contrary to Wisconsin's bipartisan tradition of environmental protection and conservation.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

IRA M. FEINBERG
Counsel of Record
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-3000
ira.feinberg@hoganlovells.com

SUSAN M. CRAWFORD
PINES BACH LLP
122 West Washington
Avenue, Suite 900
Madison, WI 53703

CARY E. ADICKMAN
MADELINE H. GITOMER
HUNTER J. KENDRICK
HOGAN LOVELLS US LLP
555 Thirteenth St., NW
Washington, DC 20004
(202) 637-5600

Counsel for Amici Curiae

SEPTEMBER 2017